13.1 CRITICAL REFLECTION: THE PURPOSES, FUNCTIONS, AND EFFECTIVENESS OF ADMINISTRATIVE LAW

<table>
<tr><th colspan="2">2 APPROACHES TO ADMINISTRATIVE LAW</th></tr>
<tr><td>Legal

Red light approach</td><td>The focus is on law and legal institutions.

Presents administrative law as being primarily concerned with providing complaints with redress for past breaches of administrative law, and society with a means by which decision-makers can be held accountable for such breaches.

Administrative law as performing what might be called the ‘expressive’ role of embodying and thereby promoting certain values such as legality, rationality, procedural fairness and so on.
● Administrative law can perform this role by its very existence, independently of its effects on bureaucratic behaviour, or even of whether individual grievances are redressed.

From the legal perspective, the regulatory goal is subsidiary to the law’s expressive and accountability-related purposes.
● The value and success of administrative law will primarily be judged not by its effects on bureaucratic behaviour, but in terms of the <u>acceptability of the values it embodies and expresses</u> and its <u>ability to provide redress to those adversely affected by unlawful decisions.</u>

Focuses more on accountability in terms of the (vertical) relationship between governors and the governed.
● In traditional constitutional terms, the legal approach is rooted in the concept of the rule of law.</td></tr>
<tr><td>Regulatory

Green light approach</td><td><u>Regulation</u>
● Deliberate attempt to influence human behaviour
● One of the major functions of government.
○ Governments regulate the movement of persons in and out of their countries.
○ They regulate their nations’ economies by controlling competition and by protecting consumers against abuse of market power.
○ Governments regulate the safety of workplaces; the operations of the gambling industry; the quality of food we eat, the air we breathe and the water we drink and so on.
● <u>The focus is on the future</u> — on influencing behaviour and its outcomes.
● Law as a ‘regulatory’ tool.

Believes that the main purpose of administrative law is the <u>influence the way decision-makers exercise their powers</u>.
● The success of administrative law as a regulatory tool should be judged primarily by its effects on bureaucratic behaviour.
● The impact of administrative law is an empirical or factual question that can — in principle, at least — be investigated by research aimed at assessing the relationship between administrative law and the behaviour of administrators.

What is involved in taking a regulatory system?
● Think about regulation in terms of a ‘system’.
● A regulatory system has 3 components:
1. A set of standards that announce how people ought to behave;
2. A mechanisms for monitoring compliance with those standards;
3. A mechanism for promoting future compliance.

<u>Administrative law consists of a set of rules and principles about how decisions ought to be made.</u></td></tr>
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- Example:
    - Rules of procedural fairness tell decision-makers that they must adopt fair procedures.
    - Rules requiring decision-makers to act consistently with relevant legal requirements.
    - Rules to make their decisions only on the basis of properly established 'jurisdictional' facts.
- **The purpose of these rules and principles is to influence the way that decision-makers exercise their functions.**
- There is no formal body that has responsibility for monitoring compliance with rules and principles of administrative law, interested and affected individuals and groups are given an incentive to monitor compliance by the availability of mechanisms — such as JR and MR — for complaining about breaches of administrative law norms.

The regulatory goal of administrative law is to influence the way decision-makers behave in the future rather than to deal with the way they have behaved in the past.

- From the regulatory perspective, there is little point 'crying over spilt milk'. Better to take steps to prevent further spills — perhaps by making the person responsible to clean it up, or perhaps in some other way.

Regulatory schemes typically have social goals — protecting the environment, or strengthening the economy, or improving the quality of education, or the health of workers.

- The ultimate goal of regulatory schemes is typically to make society better in some social or economic respect.

The **primary regulatory goal of administrative law** is to promote what might be called **'process values'.**

- Such as fair procedure and compliance by decision-makers with legal limitations on their powers.

Noteworthy feature of the regulatory approach: It understands law as one, but by no means the only, technique or tool for influencing human behaviour.

- For instance, law plays a significant role in promoting safety on the roads and in the workplace. But other factors, such as education, may also significantly influence the way people behave, and changes in social attitudes can have significant effects on human conduct.
- A major preoccupation of the regulatory approach is to compare and contrast law with other tools and techniques of regulation.

Adopting the regulatory approach also encourages us to ask questions about the relative importance of the various accountability mechanisms (JR, MR, Ombudsman) in terms, for instance, of the volume and types of complaints they handle and the degree of satisfaction that they provide to complainants.

- The regulatory approach may also lead us to ask important questions such as:
    - Whether JR is a good or bad thing
    - Whether courts are well or ill-equipped to exercise control over bureaucratic decision-making
    - Whether, as many lawyers assume, more JR is necessarily better than less.

The regulatory approach encourages us think about accountability in terms of issues of 'institutional design' and the **(horizontal) relationships** and interaction between various organs and modes of accountability.

- In traditional constitutional terms, the regulatory approach is rooted in by the concept of **separation of powers**.

TEN CHALLENGES FOR ADMINISTRATIVE JUSTICE
John McMillan

- Despite the many changes and developments of Australian development law, <u>its major themes and architecture remain the same</u>.
    - It is still a system based around external scrutiny of administrative decision making by courts, tribunals, ombudsmen and through FOI legislation.
    - It's **purpose** is to safeguard the rights that people and corporation have in relation to government.
    - The list of underlying values and objectives of administrative law remain the same: **<u>legality</u>**, **<u>rationality</u>**, **<u>impartiality</u>**, **<u>fairness</u>** and **<u>transparency</u>.**
- Theme of this paper: There has been a dramatic change over the last 30 years in how laws and programs administered by government affect members of the public.
    - This is relevant to administrative law, since the abiding concern of administrative law is to ensure that individuals receive appropriate consideration and protection against adverse government action.
    - The concern is to **uphold administrative justice**.

Complexity	● Government programs are complex. ● People get confused about government requirements and their legal obligations. ● In complex systems people make wrong choices, break the rules and fall between the cracks of different programs. People rely heavily on government for advice about what to do, and they often ask the wrong question or misconstrue the answer.
Administrative penalties	● Breaching or failing to comply with the rules of government can attract an administrative penalty. ● Administrative law can review a penalty in an individual case, yet that only occurs intermittently, and often cannot undo the personal harm suffered from a benefit suspension or departure prohibition.
Consequences that cannot be undone	● Many of the difficulties that people encounter with government cannot be repaired within the rule framework applying to their matter.
Delay and Administrative drift	● Common causes of delay are: <u>inefficiency</u>, <u>misplaced priorities within government</u>, <u>movement of difficult files from one officer to another</u>, or <u>failure to shift a difficult file to a suitable experienced officer</u>. ● The Ombudsman's office has coined the term **'administrative drift'** to describe this problem. ● Administrative drift can be frustrating to government clients but it can also cause great damage. ○ Cornelia Rau → detained for 10 months under belief she was an unlawful citizen
Poor decision making and human frailty	● Defective administrative decision-making is frequently detected and corrected by courts, tribunals and ombudsmen. ● Administrative law review enables those errors and mistakes to be corrected in individuals cases. However, this review activity cannot alleviate the underlying problem that <u>mistakes happen frequently and in the best administrative systems</u> staffed by the most competent administrative officers.
Computerisation	● Technology has improved the speed, accuracy, consistency, transparency and reliability of decision-making. However, it also throws up unique challenges to administrative law. ● Problems: ○ Officers uncritically accepted erroneous information retrieved from an IT system or drew the wrong conclusion when information about a person could not be found on the system. ○ Poor system design, development or implementation. A deficient IT system can obstruct storage of relevant information, make it harder to retrieve vital information, incorrectly merge unrelated information, miscalculate a person's entitlements or liability, send letters to the wrong people or addresses. ○ Heightens the risk that the vast storehouse of confidential information held by government can be misused.
Executive power	● Government using executive or non-statutory power to underpin service delivery, regulation and benefit allocation. ● The move away from statutory to executive schemes is partly a response to the growing size and complexity of government and the preference within government for schemes that are flexible, responsive and simple to establish, change and dismantle. ● Decisions made under executive schemes are not subject to review by tribunals or under the *ADJR Act 1977*. The only administrative law agency that can review decisions made under

	executive schemes is the Ombudsman. ● Problems: ○ This limitation on external review is of concern because decisions made under executive schemes are often indistinguishable in importance and effect from decisions made under statutory schemes. ○ Under executive schemes it can be harder for a member of public — and government decision-makers — to ascertain the rules of the scheme. ○ The risk that the rules will not be as well drafted as legislative rules. ○ Prevents objectivity in decision-making because rules are interpreted and applied by the officials who drafted them.
Outsourced service delivery	● Many government functions — including functions once thought to be core or inalienable government functions — are now discharged by non-government bodies under contract from government: prison management, airport security, benefit distribution, water and electric supply, public transport, event management, health assessment, skills appraisal and job selection. ● **Problems with government outsourcing**: ○ Service delivery standards are set out in contract not legislation or executive policy document. ○ The standards offer less protection to the public than if the function was discharged by the government. ○ The staff applying the standards may not be as well trained in public law values or may be more focused on the commercial imperative. ○ The division of responsibility between government and non-government parties can also mean that no one is well placed to address a person's grievance in a timely or effective manner.
Multiple agency action	● Contemporary government — many different agencies can be involved in making a single decision or providing a service. ● It can be difficult for a member of the public to know which agency bears responsibility for either a decision or an error that occurred in service delivery. The situation will worsen if the agencies are equally uncertain and the client or their complaint is shuffled from one agency to another.
The diversity of the client population	● The composition of the community and the way people are affected by government decisions has changed markedly over the years, and will continue to. ● The occasions on which people interact with government has also changed. ● Government regulations now controls or touched all areas of corporate and business endeavour.
Responding to the challenge of securing administrative justice ● The 10 challenges demonstrate the need for a vibrant system of administrative law that can safeguard people in their dealings with government.	
Complaint handling	● There is a need for broad based complaint handling through Ombudsmen and similar oversight agencies. ● Complaint handling is an efficient, low-cost, flexible means of handling the individual difficulties that people encounter with government. ● It can respond to problems that involve more than one agency, that cross program boundary lines or that arise in outsourced service delivery. ● Minor administrative errors can be addressed, as well as serious abuse of power. ● Complaint handling can only result in a **recommendation** and **not a binding recommendation**. ○ BUT the acceptance rate of Ombudsman recommendations by agencies is very high. ● Most common recommendations: agency provide more assistance or a better explanation to a member of the public, that the agency apologise, expedite the resolution of a person's application, revise its application forms, rewrite its administrative procedures, etc.
Remedies	● Sometimes the only remedy that is either needed or effective is for an agency to provide a person with a *better explanation* of how complex laws or agency requirements apply in their case. ● An apology may be what a person most wants if they feel wronged by an agency. ● Action by an agency to expedite a matter that has been delayed can effectively resolve many grievances. ● Financial remedies → compensation available through an executive scheme, the Scheme for Compensation for Detriment caused by Defective Administration (CCDA)

Highlighting Schematic Problems	● An agency error that occurred in once case is likely to be repeated in other cases. ● Monitoring, auditing and case sampling are effective both in picking up hidden problems and in reminding agencies that their administration is under constant scrutiny.
Cultural and Attitudinal change	● The changes and challenged are not fully recognised, and that the discipline is too deeply rooted in traditional theories and experience. ● To suggest that executive oversight agencies are institutionally incapable of holding government to account is to ignore history. ● The role that administrative law can play in securing administrative justice will be hampered if we adhere to time-worn stereotypes of accountability and independence.
Re-thinking the constitutional framework	● One way to stimulate a cultural change in administrative law is to rethink our constitutional understanding of the role of oversight agencies. ● There are now many independent agencies created by statute to oversight the decisions and actions of executive agencies: auditors-generals, ombudsmen, privacy commissioners, human rights and anti-discrimination commissioners, public sector standards commissioners, inspectors-general and corruption commissioners. ● 4th branch of government: the oversight, review and integrity branch. ○ It would enhance administrative justice to readjust our constitutional theories to take account of this new and effective system for control of government action.